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No. 92-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LARRY A. TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

In its Brief in Opposition, the government presents two arguments as to why certiorari is unwarranted in this case. The first argument misses Petitioner's point. The second indirectly supports it.

1. According to the government, Congress and the courts have recognized that former testimony may be admitted under the residual hearsay exception, even if it fails to satisfy the requirements of Fed. R. Evid. 804(b)(1). (Resp. 5-7) The government contends that this Court's decision in *United States v. Salerno*, 112

S. Ct. 2503 (1992), is inapplicable to the issue. (Resp. 7-8) The government evidently misses Petitioner's point about *Salerno*.

The government correctly states that *Salerno* does not explicitly address the application of Rule 804(b)(5) to former testimony. Significantly, though, the Court strictly construed the hearsay exceptions in holding that former testimony may not be admitted under Rule 804(b)(1) if any of the requirements of that rule are not satisfied. The Court recognized that Congress had "made a careful judgment as to what hearsay may come into evidence and what may not." 112 S. Ct. at 2507. To admit former testimony under the residual exception—as the Fourth Circuit did below and as the government urges here—emasculates Rule 804(b)(1) and Congress' careful consideration of it. If the Fourth Circuit's decision is allowed to stand, the rationale of *Salerno* would be rendered meaningless; strict construction of the enumerated hearsay exceptions would readily be subverted by admission under the residual exception.

The cases that the government cites for the proposition that former testimony failing to satisfy the requirements of Rule 804(b)(1) may nonetheless be admitted under Rule 805(b)(5) (Resp. 6-7) are in direct conflict with the rationale of *Salerno*. If these cases state good law, then Rule 804(b)(1) becomes superfluous. Congress did not intend such a result. *See* Fed. R. Evid. 803(24) & 804(b)(5), Judiciary Committee Note, Senate Report No. 93-1277 (1988) ("The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.").

Nor are the circuits in complete accord, as the government implies, that certain former testimony may be admitted under the residual exception when the requirements of Rule 804(b)(1) are not met. The government particularly misreads *United States v. Thomas*, 919 F.2d 495 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2837 (1991). (Resp. 7) That case involved the admissibility under Rule 804(b)(3) of an earlier statement that was arguably against the unavailable declarant's penal interest. 919 F.2d at 497. The court found that the statement was covered by Rule 804(b)(3), but did not meet the test for admissibility imposed by the Rule. *Id.* at 497-98. It further held that the residual exception "does not come into play unless the proffered statement is 'not specifically covered by any of the foregoing exceptions'." *Id.* at 498. Thus, *Thomas* found that the residual exception was not applicable to forms of hearsay covered by another exception, even though the elements of the other exception might not be satisfied.

As the government notes (Resp. 7 n.4), *Thomas* directly contradicts the Eleventh Circuit's decision in *United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), *cert. dismissed*, 495 U.S. 944 (1990), on the applicability of Rule 804(b)(5) when the elements of other hearsay exceptions are not satisfied. Preferring not to characterize the contradiction as a conflict between the circuits, the government dismissively explains simply that *Thomas*'s "reading of Rule 804(b)(5) is incorrect." (Resp. 7 n.4)

The government completely ignores the district court opinion in *United States v. Vigoa*, 656 F. Supp. 1499 (D.N.J. 1987), affirmed by the Third Circuit (without published opinion) at 857 F.2d 1467 (1988),

which clearly held that grand jury testimony can never be admissible under the residual exception. 656 F. Supp. at 1505 & n.7. That court held that " '[W]herever a potential use of hearsay was specifically contemplated and consciously rejected in the Rules' overall design, it would pervert Congress' plan if the residual exceptions were allowed to resurrect that rejected class of hearsay and render it admissible in derogation of its intended exclusion elsewhere in the hearsay rules.' " *Id.* at 1505 (citation omitted). Contrary to the Fourth Circuit below, *Vigoa* held that Rule 804(b)(5) would swallow up Rule 804(b)(1) if grand jury testimony could admitted under the residual exception.

2. Although recognizing that the circuits disagree on whether the existence of an immunity agreement enhances or detracts from the reliability of former testimony, the government finds no conflict—because those courts were simply making fact determinations. (Resp. 8-13) The government argues that courts must look at several factors to determine the trustworthiness of grand jury testimony, as the Fourth Circuit did below.

This argument is problematic in several respects. To start, the trial court in this case never made a factual determination on the record as to the reliability of the testimony at issue. No special hearing was held, and the trial court barely addressed any of the factors relied upon by the Fourth Circuit. Since the trial court neither discussed nor considered the elements of reliability, the Fourth Circuit's opinion must be read as indicating that reliability may be presumed as a matter of law when the enumerated

factors are present. Other courts, however, have found that the same factors are elements of unreliability.

The government does not dispute that courts draw conflicting inferences from identical factors in cases under Rule 804(b)(5). This Court has held that courts have "considerable leeway" in choosing which factors they will consider, *see Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 3150 (1990), but, even allowing considerable leeway, has not invited courts to interpret a specific factor, such as a grant of immunity, as enhancing reliability in one case and detracting from it in another.

Almost every case involving an immunized grand jury witness will present the same factors that the Fourth Circuit cited in this case and that the government cites in its Brief in Opposition. (Resp. 8-11) There will always be a grant of immunity. The immunity agreement invariably will require the witness to testify truthfully. The witness will routinely have advice of counsel when entering into the agreement. The prosecutor will routinely investigate the witness' testimony in order to corroborate it and the witness will be advised that the immunity may be revoked if he or she testifies falsely. The witness invariably will be aware that his or her testimony is given under oath. The witness invariably will be subject to prosecution for perjury if he or she testifies falsely. Each of these factors cannot both enhance or detract from reliability, depending on the case or the court. The admissibility of damaging, uncross-examined grand jury testimony cannot be backhanded as a mere fact determination made without reference to legal standards.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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